UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

OSHMAN FAMILY JEWISH COMMUNITY CENTER (Palo Alto, California)

Employer

and

KIM BULGER, an Individual **Case 32-RD-1599**

Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, a/w/ CHANGE TO WIN AND THE CENTRAL LABOR COUNCIL

Union[1]

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Oshman Family Jewish Community Center, herein called the Employer, a California non-profit 501(C)(3) corporation with a facility located at 3921 Fabian Way in Palo Alto, California, is engaged in the operation of a preschool, fitness center, and other community education programs. Service Employees International Union Local 521, herein called the Union, represents a collective-bargaining unit (herein called the Unit) consisting of all full-time and regular part-time (20 hours per week, full benefits) teachers' aides, assistant teachers, associate teachers, teachers, master teachers,

[1] The names of the Employer and the Union appear as corrected at the hearing.

administrative assistants, and office coordinators employed by the Employer at this facility.[2] On January 7, 2011, Kim Bulger, an individual, herein called the Petitioner, filed a petition in Case 32-RD-1599 with the National Labor Relations Board under Section 9(c) of the National Labor Relations seeking to decertify the Union as the collective-bargaining representative of the employees in this Unit.

A hearing officer of the Board held a hearing in this matter on January 18, 2011. Petitioner, the Union, and the Employer appeared at the hearing. The Union filed a post-hearing brief with me, which I have duly considered.

As evidenced at the hearing and on brief, the sole issue before me concerns whether the petition in the case is subject to a contract bar. The Union contends that a contract bar exists because the parties reached full and complete agreement on the terms of a successor contract, this contract was ratified by the unit employees prior to the date that the petition was filed, and the Employer implemented the terms of this agreement. Alternatively, the Union argues that a contract bar exists because the previous contract rolled over for another year under the Evergreen clause in that contract. By contrast, the Employer contends that no contract bar exists, even though the parties reached tentative agreement on a number of contract provisions, because there was no formal language agreed to; there were a number of items left open; there were no signatures on any document indicating that agreement on a contract had been reached; and no implementation of any of its terms had occurred at the time the petition was filed. For her part, Petitioner stated that she does not believe that there is a contract bar because at the final bargaining session there was no document written or signed reflecting the

[2] The description of the Unit appears as stipulated by the parties at the hearing.

agreed-upon terms; it was stated that the Employer's lawyer would be preparing the written contract but this was never done; and at the ratification meeting the document presented by the Union to the Unit employees to vote on had items missing from it.

I have carefully considered the evidence and the arguments presented by all parties on these issues. As set forth below, I have concluded, in agreement with the Petitioner and the Employer that the instant RD petition is not subject to a contract bar. Accordingly, I am directing an election in the Unit.

There are approximately 44 employees in this Unit.

THE FACTS

The Employer is a California corporation engaged in the operation of a pre-school, fitness center, and other community education programs in Palo Alto, California. Since at least 2001, the Union has represented the Unit employees at this facility as a separate single-facility unit. There have been a series of collective-bargaining agreements in effect between the Employer and the Union covering this single-facility Unit. The most recent of these contracts, herein called the Agreement, was effective by its terms for the period from January 1, 2007 through December 31, 2009. On January 1, 2010, the Agreement rolled-over for another year under the Evergreen clause, which thereby extended the contract until December 31, 2010.[3] In the fall of 2010, Nicholas Raisch, the Union's internal worksite organizer and chief negotiator, sent a reopener notice to the Employer before the ninety-day window period. As a result of this action, the Agreement was terminated effective January 1, 2011.

[3] All dates hereinafter are in 2010 unless otherwise indicated.

After the contract was reopened, the parties held a series of bargaining sessions in December in an effort to negotiate a successor agreement to the Agreement. The first of these sessions was held on December 1. At this meeting, the Union presented the Employer with a document entitled "Agreement For 2010 Negotiations," hereinafter called the Ground Rules. After minor modifications were made, both parties signed the document. Ground Rule number four states, in relevant part:

> As agreements are reached, they shall be put in written form, dates and times, and labeled as Tentative Agreements, and two copies of each shall be signed by the spokesperson for each party. Agreement on specific items of negotiation shall not be binding on either party until the entire package of Tentative Agreements is ratified/approved by both parties… The Employer and the Union will hold their own respective process for ratification of the tentative agreement within fifteen (15) calendar days of when the overall tentative agreement has been reached to become final.

The parties met again for negotiations on December 6, 13, and 15. During these sessions, the parties exchanged proposals, discussed the outstanding issues, and reached a verbal tentative agreement on many of the outstanding issues. However, in spite of the fact that the Ground Rules required each party to sign two copies of each Tentative Agreement as it was reached, it is undisputed that none of the individual Tentative Agreements were initialed or signed by either party. Nor was the purported overall tentative agreement initialed or signed by either party at the end of the last bargaining session on December 15. Instead, the parties merely either gave their verbal assent to each individual Tentative Agreement as it was reached, or they exchanged written proposals which sometimes indicated that a party "accepted" the other's proposal on a particular subject. At the end of the last session on December 15, the parties shook hands, purportedly to reflect that they had

reached an overall tentative agreement.[4] The Employer then agreed to compile all of the tentative agreements into an overall contract draft and to send it to the Union for its review. A few days later, the Union held a ratification meeting, the Unit employees voted to ratify the contract, and the Union advised the Employer of the ratification. However, before the Employer could draft the overall agreement and before either party signed or initialed the purported agreement, on January 7, 2011, the decertification petition in this case was filed.

ANALYSIS

1. The Case Law Regarding Contract Bar

When a petition is filed for a representation election among a group of employees but a party alleges that they are already covered by an existing collective bargaining agreement, the Board must decide whether the asserted contract exists in fact and conforms to certain requirements. If the Board finds that the contract does exist and it also meets these requirements, that contract is held to be a bar to a representation election. This is what is known as the Board's contract bar doctrine. However, because the finding of a contract bar restricts the rights of employees freely to choose a collective bargaining representative, the Board places the burden of proving a contract bar on the party asserting the doctrine. *Roosevelt Memorial Park*, 187 NLRB 517 (1970). To meet that burden, the party asserting a contract bar must prove that the alleged agreement was reduced to writing and "signed by all the parties at the time the petition is filed." *Herlin Press,* 177 NLRB 940 (1969). The contract bar doctrine does not require that a formal

[4] According to Raisch, the parties' past practice had always been to come to verbal agreements on each substantive proposal; to not initial or sign any of the tentative agreements; and to only sign a copy of the contract after all of the necessary language changes were made and the entire agreement had been reduced to writing. However, Raisch did not explain why the parties had failed to follow the requirement in the Ground Rules for these negotiations stating that each tentative agreement must be signed by the spokesperson for each party.

final document exist. Rather, a group of informal documents or tentative agreements can constitute a contract bar provided that they lay out substantial terms and conditions of employment and they are signed by both the union and the employer. *Waste Management of Maryland,* 338 NLRB 1002 (2003). However, this flexibility does not excuse the parties from the fundamental requirement that they signify their agreement by attaching their signatures to a document or documents that tie together their negotiations, by either spelling out the contract's specific terms or referencing other documents which do so. See *Seton Medical Center*, 317 NLRB 87 (1995); *Waste Management, supra*; *Appalachian Shale Products Co.,* 121 NLRB 1160 (1958); *Young Women's Christian Association of Western Massachusetts,* 349 NLRB 762 (2007) (Board utilizes a "bright-line rule" that, for contract bar purposes, a collective-bargaining agreement must be written and signed).

2. **Application of the Case Law To This Case**

In the case before me, it is undisputed that, while the parties did reach verbal agreement on a number of contract provisions, they neither initialed nor signed any of these individual tentative agreements. Nor did the parties compile and execute a single document which evidenced the totality of the parties' agreement and showed that the collective-bargaining negotiations had concluded. *Seton, supra* at 87 – 88. Under these circumstances, even though (according to the Union) the parties subjectively believed they had reached an overall agreement, even though the Unit employees had ratified that agreement, and even though the Union communicated that fact to the Employer, Board law is well established that no contract bar exists.

On brief the Union disputes this conclusion, asserting that "the Board need not require that the party asserting the existence of a contract bar proffer a *signed* document in order to establish the existence of a contract bar." In support of this proposition, the Union cites *Georgia Purchasing, Inc.,* 230 NLRB 183 (1977), in which the Board found a contract bar where the employer and the union exchanged telegrams that expressed the terms of their tentative agreements. The Union asserts that because these telegrams were not signed documents, this case stands for the proposition that a contract bar can be found even where the proposals that make up the putative tentative agreement are not signed by either party.

I find that the Union has overstated the holding of *Georgia Purchasing.* In this regard, I note that the issue in that case was not whether the parties' exchange of telegrams constituted a signed offer and a signed acceptance but, rather, whether the alleged tentative agreement reflected in the exchange of telegrams contained substantial terms and conditions of employment or left material issues to further negotiations. When the Board held that a contract bar existed, it did so because it found the exchange of telegrams did contain sufficient substantial terms and conditions. The Board was not faced with, and did not resolve, the issue of whether the purported agreement was signed by both parties. Accordingly, I reject the Union's argument that in *Georgia Purchasing* the Board *sub silento* modified or overturned its oft stated rule which requires for contract bar purposes a signed or initialed document reflecting the parties' overall agreement. In reaching this conclusion, I note in particular that subsequent to *Georgia Purchasing,* the Board's contract bar decisions have continued to apply the signature requirement, thereby belying any claim that *Georgia Purchasing* changed this rule. See, e.g., *Waste*

Management, supra; Seton Medical, supra; and *Young Women's Christian Association, supra* . In this regard, I am also guided by the Board's seminal decision in *Appalachian Shale, supra.* In that case, the Board overturned its previous decisions holding that an exception to the signature rule exists where an unsigned contract could still serve as a bar if the parties considered the agreement properly concluded and put into effect some of its important terms. The Board held that the effectiveness of its contract bar rule could best be served by eliminating this exception because it only served to complicate an area that should be simple and straightforward. In this 1958 decision, the Board concluded that "after more than 20 years of contract bar policy, the parties should be expected to adhere to this relatively simple requirement." Id. at 1162. Fifty years later, in the case before me, there is even more reason to adhere to this time-tested rule.

Therefore, based on the Board's holdings in the above-cited cases, because there is no signed or initialed document containing the terms of the parties purported agreement, I find that no contract bar exists.[5]

3. The Union's Argument That Current Board Law Requiring A Signed Writing For A Contract Bar To Exist Should Be Overturned Or Modified

On brief, the Union argues that the Board's contract bar rules should be modified to allow the following exception:

> If the Board determines that the incumbent union, through the filing of a position statement or other response to the Board's investigatory inquiries, makes a *prima facie* showing of the existence of a contract bar, and the Board orders a hearing regarding such matter based on the *prima facie* showing, if at the hearing the Employer concedes under oath that the

[5] In its post-hearing brief, the Union also asserts that a collective-bargaining agreement can be found in this case if one compiles a series of documents reflecting the parties' tentative agreements on proposals that together establish the existence of a tentative agreement that contains substantial terms and conditions of employment. However, this argument misses the point. In finding that no contract bar exists, I am not finding that the alleged overall tentative agreement fails to contain substantial terms and conditions of employment. Rather, I am finding that it is not a bar because it was not signed by either of the parties.

parties reached tentative agreement on substantive issues, the Board must find that there is in fact a contract bar.

The Union then asserts that if this exception is applied to this case, a contract bar should be found.

In analyzing this argument, I note, as a preliminary matter, that I am bound by extant Board authority regarding the application of the contract bar rule. I further note that the exception that the Union wishes me to carve out is the exact same one that the Board eliminated in its decision in *Appalachian Shale, supra,* more than 50 years ago. Since that time, the Board has consistently adhered to the contract bar rule articulated in that case, reasoning that the requirement of a signed writing provides a straightforward and simple procedure for the parties to follow. In the instant case, the Union has not presented any compelling arguments that would warrant departing from this established rule. Therefore, for all of the above reasons, I decline the Union's invitation to create an exception to the Board's contract bar rules.

4) The Union's Alternative Theory: The Agreement Rolled Over For Another Year Pursuant To the Evergreen Clause

At the very close of the hearing and on brief, the Union raised as an alternative theory that the Agreement is still in effect because it rolled over until December 31, 2011 under the Evergreen clause in Section 25 of that Agreement. Therefore, the Union argues that the rolled-over Agreement constitutes a contract bar.

In support of this argument, the Union asserts that at the hearing the Employer failed to proffer any "evidence that either party had furnished the other with written notice of its intent to amend, modify, or terminate the collective bargaining agreement" or that Nicholas "Rausch or any other SEIU Local 521 (official) had sufficient authority

to reopen the contract on behalf of the Union." The Union also notes that at the hearing the Employer (in response to the Union's argument that the terms of the tentative agreement had been implemented) stated that the Employer had not made any such changes because "the old contract is also the current contract and it is still in effect." According to the Union, the absence of such evidence, combined with the Employer's alleged admission that the prior contract "is still in effect, leads to the irrefutable conclusion that the parties' current contract … has rolled over one additional year pursuant to the evergreen clause contained therein."

I reject this argument and, in doing so, note that the burden of proving a contract bar is on the party asserting the bar. Thus, the burden in this case is on the Union to prove that the old contract rolled over, and not on the Employer to prove that the Agreement was terminated. The Union has failed to meet this burden. To the contrary, during the hearing the Union called Rausch as a witness and elicited the following testimony from him: "We sent a notice before the ninety-day window in order to negotiate a contract." Rausch stated that the Union sent this letter to the Employer to advise it that the Union "had the intent to bargain a successor agreement to our previous agreement." Thus, at the hearing, Rausch admitted that a timely reopener notice had been sent, thus preventing the Evergreen clause from operating to roll-over the Agreement for another year.

To get around this inevitable conclusion, on brief the Union asserts that the Employer has failed to prove that Rausch had the authority to send this letter. However, I note that Rausch entered an appearance at the hearing as the representative of the Union, and the Union's attorney called him to the stand as the Union's only witness. Moreover,

it was the Union's attorney who elicited from Rausch the testimony that the Union sent a timely reopener notice to the Employer. I also note that it is undisputed that the Union held three bargaining sessions with the Employer, and it conducted a ratification vote on the alleged tentative agreement. All of these actions are inconsistent with any assertion that the contract rolled over. Finally, I note that the Employer's purported admission that the old contract "is still in effect" can be viewed as an acknowledgement that it is required under Board law to keep the substantive terms of the old contract in effect until a new one is agreed to and signed. This is nothing more than an accurate summary of Board law regarding unilateral changes. Accordingly, for all of the above-reasons, I reject the Union's alternative "roll-over" theory as not in accord with either the facts or the law.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.[6]

2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.[7]

[6] In particular, I affirm the hearing officer's decision to preclude the Union from submitting additional testimonial and documentary evidence regarding the bargaining sessions and to limit the Union to presenting an offer of proof and to placing its exhibits in a rejected exhibit file. In agreement with the hearing officer, I find that this proffered evidence is legally irrelevant to the contract bar issue before me since the Union concedes that none of the tentative agreements were signed or initialed by either party.

[7] The parties stipulated that the Employer, a California non-profit 501(c)(3) corporation, is engaged in the operation of a preschool, fitness center, and community programs in Palo Alto, California and that during the past twelve months, the Employer had annual gross revenues in excess of $1,000,000 and during that

3. The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The Union claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6*)* and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time (20 hours per week, full benefits) teachers' aides, assistant teachers, associate teachers, teachers, master teachers, administrative assistants, and office coordinators employed by the Employer at its Palo Alto, California facility; excluding all other employees, guards, and supervisors as defined in the Act.[8]

There are approximately 44 employees in the unit.

DIRECTION OF ELECTION

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same period has purchased more than $5,000 worth of goods and materials which originated outside the State of California.

[8] After the close of the hearing, the record was reopened to accept into evidence as Board Exhibit No. 3 a stipulation signed by all parties that the classifications in the currently recognized unit contain no professional employees within the meaning of Section 2(12) of the Act. Thus, the work performed by those classifications does not require advanced knowledge customarily acquired through a prolonged course of specialized instruction at an institution of higher learning. The Employer does not require employees in those classifications to possess a four-year degree from an institution of higher learning or advanced knowledge customarily acquired through a prolonged course of specialized instruction at an institution of higher learning. The Employer requires employees, with the exception of teacher aides and teacher assistants, to complete at least 12 semester units of coursework in the field of early childhood education or child development but does not require employees in those classifications to possess a degree in early childhood education or child development. Finally, the parties stipulated that the Employer does not require teacher aides or teacher assistants to complete any post-secondary coursework in the field of early childhood education or child development. Based upon this stipulation, I find that the Unit is not a mixed professional and non-professional unit, and, therefore, no issues arising under *Sonotone Corp.,* 90 NLRB 1236 (1950), are presented in this case.

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective-bargaining by Service Employees International Union Local 521. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in each unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company,* 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list for each of the separate collective-bargaining units, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). Each list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to the Petitioner.

To be timely filed, the list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before **February 11, 2011.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, **www.nlrb.gov,**[9] by mail, by hand or courier delivery, or by facsimile

[9] To file the eligibility list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the eligibility list, and click the Submit Form button. Guidance for E-filing is contained in the attachment

transmission at (510) 637-3315. The burden of establishing the timely filing and receipt of the list will continue to be placed upon the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile or electronically, in which case only **one** copy need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board,

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supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, www.nlrb.gov.

addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **February 18, 2011.** The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[10] but may **not** be filed by facsimile.

Dated: February 4, 2011.

William Baudler, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5211

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[10] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, www.nlrb.gov.